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No. 92-615

In The

Supreme Court of the United States

October Term, 1992

PACIFIC TELESIS GROUP, a corporation; PACIFIC BELL, a corporation; PACIFIC BELL DIRECTORY, a corporation,

Petitioners,

vs.

TALKING YELLOW PAGES, INC., dba PRIMEX,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTION PRESENTED

1. Did the Ninth Circuit err in granting Talking Yellow Pages, Inc.'s (hereinafter "Primex") leave to amend its First Amended Complaint in light of the plaintiff's ability to amend its complaint to allege all of the requisite elements of its claim for attempted monopolization against Pacific Telesis Group, Pacific Bell, and Pacific Bell Directory (hereinafter "Pacific Bell") under Section 2 of the Sherman Act, 15 U.S.C. § 2?

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Facts Supporting Primex's Claim of Attempted Monopolization.

Primex appealed the district court's dismissal without leave to amend the plaintiff's First Amended Complaint[1] for attempted monopolization arising from Pacific

[1] Although captioned "First Amended Complaint," Primex's complaint against Pacific Bell has never been substantively amended. Rather, the plaintiff filed its "First Amended

Bell's intentional and exclusionary conduct in the market for telephone information services.[2] Petitioners' Appendix ("Pet. App.") at 1a.

Contrary to the factual characterization contained in Pacific Bell's petition for certiorari, Primex has alleged that both parties compete in the relevant market for telephonic information services, *i.e.*, the service by which callers ascertain the telephone numbers of various businesses.[3] *Id.* at 3a. In addition, Pacific Bell and Primex compete on the basis of price and quality of service for local businesses seeking to advertise through such telephone information media.

Complaint" in response to Pacific Bell's objection that the original complaint contained confidential information. The First Amended Complaint, while deleting these specific references, is otherwise identical to the original complaint. Although the Original and First Amended Complaint contain virtually the same factual allegations and assert the same antitrust and supplemental state causes of action, Pacific Bell answered the original complaint, but moved under Fed. R. Civ. P. 12(b)(6) to dismiss with prejudice the First Amended Complaint.

[2] Primex did not appeal the district court's dismissal of its claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, because the conspiracy alleged failed to state a claim under this Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777, 104 S. Ct. 2731, 2745 (1984). The decision to drop the Section 1 claim was not in any way based on a finding that the plaintiff's conduct failed to satisfy the anticompetitive conduct required for a claim under Section 1.

[3] As recognized by the district court in its order denying Primex's motion to amend the judgment, the plaintiff sufficiently identified a relevant market in which both parties compete. Pet. App. at 14a. The First Amended Complaint, therefore, is not susceptible for dismissal on the ground that Primex and Pacific Bell do not compete in the same relevant market.

At the time that the complaint was filed, Pacific Bell provided information to callers and sold space to advertisers in both its published directories (*e.g.*, yellow and white pages) and operator-assisted directories (*e.g.*, "411") for particular geographic areas.[4] Primex offered similar information to consumers and advertisers, but did so in an electronic format (*e.g.*, "talking yellow pages"). As offering products that are reasonably interchangeable with one another, the parties are capable of depriving one another of a substantial amount of business. *Thurman Industries, Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1374 (9th Cir. 1989).

Primex further alleges that Pacific Bell, cognizant of the fact that its information services were both technologically inferior and higher priced, employed its monopoly power over the provision of telephone services to intentionally degrade the phone service available to Primex. Pet. App. at 3a. Pacific Bell's interference was done with the intention to foreclose Primex from access to potential customers and to prevent Primex from competing effectively against Pacific Bell. *Id.* By hobbling Primex's talking yellow pages service, Pacific Bell would be able to

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[4] Regional telephone companies dominate the business of providing information and selling advertising through their published directories in particular geographic areas. *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158, 1159 (9th Cir. 1991)("In those areas where it publishes the yellow pages directory as the local phone company, GTE occupies a huge market share of the yellow pages advertising market: over 98% in Anchorage, Oahu, and Tampa; 95% in Las Vegas; 77.2% in Long Beach, California."), *cert. denied*, 112 S. Ct. 1947 (1992).

join the electronic aspect of the relevant market at a later time without having to confront entrenched competition.

By misusing its monopoly over local telephone service and by intentionally foreclosing Primex's ability to offer its services by its exclusionary conduct, Pacific Bell has attempted to monopolize the relevant market. As correctly characterized by the Ninth Circuit, Pacific Bell's conduct has had the effect of raising the barriers to competition in the relevant market. *Id.* at 7a.

By raising barriers to entry, Pacific Bell has prevented consumers from having the choice to select among viable competing services offered by Primex and other providers of electronic directories and has effectively reduced output in the relevant market. Such anticompetitive effects unequivocally constitute antitrust injury required by Section 4 of the Clayton Act, 15 U.S.C. § 15.

B. Despite the Fact that Primex Could Amend Its Complaint to Allege the Requisite Elements of a Claim for Attempted Monopolization, the District Court Granted Pacific Bell's Motion to Dismiss Without Leave to Amend.

As demonstrated above, had the district court granted it leave to amend, Primex could have fairly and permissibly alleged the four required elements in support of its claim for attempted monopolization. *Movie 1 & 2 v. United Artists Communications, Inc.*, 909 F.2d 1245, 1255 (9th Cir. 1990), *cert. denied sub nom. Paramount Pictures Corp. v. Movie 1 & 2*, 111 S. Ct. 2852 (1991). Primex could allege that:

(1) Pacific Bell had the specific intent to control prices or destroy competition in some part of commerce;

(2) Pacific Bell employed predatory or anticompetitive conduct directed toward accomplishing that purpose;

(3) Pacific Bell had a dangerous probability of success; and

(4) Primex suffered causal antitrust injury as a result of Pacific Bell's anticompetitive conduct.

Despite Primex's ability to allege each element of a claim for attempted monopolization, the district court granted Pacific Bell's motion to dismiss without granting leave to amend and, in an order drafted by Pacific Bell, dismissed Primex's complaint with prejudice.[5]

C. The Ninth Circuit Reversed the District Court's Dismissal Without Leave to Amend.

The Ninth Circuit, in an unreported *per curiam* opinion, did nothing more than reverse the district court's impermissible dismissal of an unamended complaint, asserting that because there existed sufficient facts upon which Primex could allege a cognizable claim for attempted monopolization, the motion to dismiss should not have been granted with prejudice. Pet. App. at 7a.

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[5] Within the period of time in which such a motion shall be made, Primex moved the court under Fed. R. Civ. P. 59(e) to reconsider its judgment to permit Primex to amend its First Amended Complaint. Given that the Ninth Circuit concluded that leave to amend should have been granted in the first instance, the district court's denial of plaintiff's Rule 59(e) motion is moot and immaterial to the issues presented in this petition for certiorari.

Although in its analysis the Ninth Circuit gave Primex the benefit of the doubt regarding the ultimate proof of certain elements of its claim by way of certain inferences, the Ninth Circuit did not dictate to the plaintiff the manner in which, upon remand, it should amend its complaint. *Id.* at 2a-3a & n2.

REASONS FOR DENYING THE WRIT

The Ninth Circuit's decision to allow Primex to amend its complaint to allege each of the requisite elements of a claim for attempted monopolization is wholly unremarkable and implicates none of the grounds upon which certiorari is appropriately granted. The decision to allow Primex to amend was consistent with the well-established law of this Court. Further, there is nothing, by way of the Court's upcoming decision in the *McQuillan* case that will adversely effect Primex's ability to state a claim for attempted monopolization.

Pacific Bell's petition for certiorari should, therefore, be denied.

ARGUMENT

Pacific Bell's attempt to reconstitute the Ninth Circuit's simple and straightforward ruling that Primex should have been afforded leave to amend its complaint into a highly controversial decision dependent upon this Court's affirmance of *McQuillan v. Sorbothane, Inc.*, 907 F.2d 154 (9th Cir. 1990)(mem.), *cert. granted sub nom. Spectrum Sports, Inc. v. McQuillan*, 112 S. Ct. 1557 (1992) (hereinafter *"McQuillan"*) should be flatly rejected.

A. Dismissals Without Leave to Amend, as This Court Has Clearly Stated, Should Be Rarely Granted.

The Ninth Circuit's decision in this case does nothing more than apply in a particular factual context the well-established rule of law that dismissals of an antitrust complaint without leave to amend are particularly disfavored and should be rarely granted. *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746, 96 S. Ct. 1848, 1853 (1976). As is the law of this Court and of every circuit, a complaint need allege only sufficient facts from which the court can decipher the elements of an antitrust violation. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957); *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Development Corp.*, 711 F.2d 989, 995 (11th Cir. 1983).

The Ninth Circuit concluded, again applying the well-worn standards of this Court, that where, as in this case, amendment of the complaint was not futile, Primex should have been given the opportunity to amend in order to clarify or otherwise plead any omitted elements of the offense.

B. Leave to Amend Is Appropriate in Light of Primex's Ability to Allege Each Element of Its Antitrust Claim.

As demonstrated *supra*, Primex is able to allege facts in support of each of the requisite elements of its claim for attempted monopolization. Primex can point to statements by Pacific Bell demonstrating its exclusionary intent. *See Syufy Enterprises v. American Multicinema, Inc.*,

793 F.2d 990, 999 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987). Primex can also allege predatory conduct through which Pacific Bell has impaired competition. *See* 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 625b (1978); Pet. App. at 3a. Primex can also allege dangerous probability of success. Where an entrenched monopolist in one market engages in strategies to increase a downstream rival's cost of doing business and endangers a "fledgling venture's" ability to continue as an ongoing firm, this element is satisfied. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377, 93 S. Ct. 1022, 1029 (1973); *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 991-92 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

Finally, as the Ninth Circuit held, Primex can amend its complaint to allege the final element of causal antitrust injury. Pet. App. at 7a; *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 697 (1977). Allegations of acts that threaten foreclosure of rivals with better goods and services from the market or that create obstacles or barriers to entry satisfy the requirements of injury. Pet. App. at 7a; *Multiflex*, 709 F.2d at 994. To the extent that a rival can allege injuries flowing from these prohibited effects, causal injury is established. *Advanced Health-Care Services, Inc. v. Radford Community Hospital*, 910 F.2d 139, 147-48 (4th Cir. 1990).

C. The Outcome of the *McQuillan* Decision Does Not Control Primex's Ability to Amend Its Complaint.

Unlike *McQuillan*, the case that Pacific Bell asserts controls the outcome in this case, Primex is still at the pleading stage. Unlike *McQuillan*, it is neither necessary

to the outcome of the Ninth Circuit's opinion nor essential to Primex's ultimate ability to prove its claim against Pacific Bell that it receive the benefit of *any* inferences on *any* element of the offense. The double inference relied upon for liability in *McQuillan* simply does not apply in this case. Should, therefore, this Court reject *McQuillan* and reverse the Ninth Circuit, that decision would not effect Primex's ability to amend its complaint for attempted monopolization against Pacific Bell. Thus, this case does *not* involve "the application of the Ninth Circuit's unique rule which . . . allows a trier of fact in an attempt to monopolize case to infer dangerous probability and specific intent from predatory conduct." *But see* Pacific Bell's Petition for Certiorari at 1.

CONCLUSION

As demonstrated above, Primex can allege facts sufficient to satisfy each and every element of a claim for attempted monopolization. The Ninth Circuit's opinion simply agreed with that assessment and reversed the district court's dismissal without leave to amend. Primex has no present or future intentions of relying on the double inferences of *McQuillan* to support the allegations of its complaint; nor, given the fact presented here, will such inferences be necessary to prove the case at trial. This Court's decision in *McQuillan*, therefore, is simply immaterial.

The Ninth Circuit's decision in this case, which does nothing more than apply the well-established tenets of civil procedure, does not afford a basis for a writ of

certiorari. Pacific Bell's petition, therefore, should be denied.

Dated: November 6, 1992

Respectfully submitted,

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